

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

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Page 65

74-2662

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2662

UNITED STATES OF AMERICA,

Appellant,

—v.—

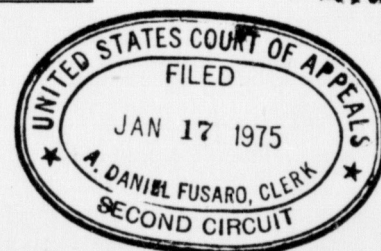
LOUIS ZAICEK,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S APPENDIX

PAUL J. CURRAN,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*



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A 1
JUDGE METZNER

74 CRIM. 1036

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U. S.:
VS.	Frederick T. Davis, AUSA.
LOUIS ZAICEK	791-1941
	For Defendant:

ABSTRACT OF COSTS	AMOUNT	CASH RECEIVED AND DISBURSED			
		DATE	NAME	RECEIVED	DISBURSED
01) Fine,					
lark,					
Marshal,					
Attorney,					
Commissioner's Court,					
Witnesses,					
:1708 Possess. of stolen mail.(Cts.1&2)					
:2312 Transporting stolen motor vehicle.(Ct.3)					
(Three Counts)					

DATE	PROCEEDINGS
6-74	Filed indictment.
13-74	The deft. (atty.present) waives reading of indictment and pleads Not Guilty. Deft. R.O.R. Bail extended to include the State of Florida. Suppression hearing held and concluded. Dec. Res. - METZNER,J.
18-74	Filed OPINION #41449 - Deft. moves to suppress as evidence stolen bonds discovered in course of search of a car that was seized in connection with his arrest for having stolen the car... - Defendant's motion to suppress is granted - So ordered METZNER,J.
3-74	Filed Govt.motion that deft.'s motion to suppress of evidence be reheard.

DATE	PROCEEDINGS	CLERK'S FEES	
		PLAINTIFF	DEFENDANT
12-10-74	Filed Defts. Answering Affidavit		
12-10-74	Filed OPINION #41550. . . Governments motion for rehearing of the granting of suppress motion is denied and the trial will be stayed until 1/6/75 to afford the government an opportunity to file a notice of appeal from the granting of motion to suppress and the denial of this motion for a rehearing. So ordered. - METZNER, J.		
12-17-74	ZAICEK - Filed Notice of Appeal from the order filed 11/18/74 granting a motion to suppress the contents of certain attache case as evidence and also appeals from the order of Judge Metzner, filed 12/9/74 denying motion.		
12-17-74	Filed Govt. Certification pursuant to 18USC Sec.3731.		
12-20-74	Filed original record on appeal in U.S.C.A. for 2nd Circuit this date.		
12-23-74	Filed Govt. Motion adjourning trial date.		
Dec. 24-74	Filed memo end. on pltfs. motion dated Dec. 23, 1974 to adj. that the trial in this case now set for Jan. 6, 1975 be adj. until a date to be set immediately after the resolution of the appeal filed by the US on Dec. 17, 1974. This application is granted. So ordered, Metzner, J. m/n		
2-29-74*	Filed transcript of record of proceedings DTD: Nov. 13-74		

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA :

- v - :

INDICTMENT

LOUIS ZAICEK, :

S. 74 Cr. 1036

Defendant. :

----- x

COUNT ONE

The Grand Jury charges:

On or about the 27th day of December, 1972 in the Southern District of New York, LOUIS ZAICEK, the defendant, did unlawfully, wilfully and knowingly have in his possession the contents of a certain letter addressed to:

The State Street Bank and Trust Co.
225 Franklin Street
Boston, Massachusetts 02101,

to wit, two \$5,000 3.20% State of New Hampshire General Obligation Bonds, due October 1, 1979, and two \$5,000 3.80% City of Rollingsford, New Hampshire General Obligation Bonds, due June 1, 1976, which had been stolen, taken, embezzled and abstracted from and out of an authorized depository for mail matter knowing the same to have been stolen, taken, embezzled and abstracted.

(Title 18, United States Code, Section 1708.)

The Grand Jury further charges:

On or about the 27th day of December, 1972 in the Southern District of New York, LOUIS ZAICEK the defendant, did unlawfully, wilfully and knowingly have in his possession the contents of a certain letter addressed to:

The State Street Bank and Trust Co.
225 Franklin Street
Boston, Massachusetts 02101,

to wit, three \$5,000 4.90% City of Goffstown, New Hampshire General Obligation Bonds, due October 1, 1984 which had been stolen, taken, embezzled and abstracted from and out of an authorized depository for mail matter knowing the same to have been stolen, taken, embezzled and abstracted.

(Title 18, United States Code, Section 1708.)

COUNT THREE

The Grand Jury further charges:

In the month of December, 1972, in the Southern District of New York, LOUIS ZAICEK, the defendant, unlawfully, wilfully, and knowingly did transport in interstate commerce from Vermont to Valhalla, New York a motor vehicle, to wit, a 1972 Cadillac El Dorado, vehicle identification number 6L67S2Q435634, knowing the same to have been stolen.

(Title 18, United States Code, Section 2312).

FOREMAN

PAUL J. CUREAN
United States Attorney

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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4 UNITED STATES OF AMERICA :
5 vs. :
6 LOUIS ZAICEK, : 74 Cr 1036
7 Defendant. :
8 -----X

9 B e f o r e :

10 HON. CHARLES M. METZNER,

11 District Judge

12
13 New York, N. Y.
November 13, 1974 - 10:30 a.m.

14 A p p e a r a n c e s :

15 PAUL J. CURRAN, Esq.
16 United States Attorney for the
17 Southern District of New York
BY: FREDERICK DAVIS, Esq.
18 JAMES E. NESLAND, Esq.
Assistant United States Attorneys

19 LANNA, COPPOLA & ROSATO, Esqs.
Attorneys for the Defendant
20 BY: VINCENT W. LANNA, Esq.

(Case called)

MR. DAVIS: The Government is ready.

MR. LANNA: Defendant is ready.

THE COURT: Is Mr. Zaicek here?

MR. LANNA: Yes, sir. He just showed.

THE CLERK: Mr. Lanna, do you have an application to make to the Court with respect to this plea?

MR. LANNA: Yes, I do. A few applications, if your Honor please.

As your Honor well knows, the Government has brought in a superseding indictment -- I have to get the number --

THE COURT: 1036.

MR. LANNA: 1036. -- which ostensibly replaces the information which was formerly filed before your Honor and which was marked back in September or October for trial today.

An examination of this indictment merely shows that it has incorporated the two counts from that information and has added a third count and that is a violation of Section 2312 of Title 18 of transporting a stolen car across state lines.

The information which is included within that third count was known to the Government back in December of

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2 1972. A warrant was issued for the arrest of this
3 defendant in October of 1973. And I don't know why there
4 was such a delay even at that rate. He was arrested in
5 May of 1974 for an additional delay, for which I can give
6 no explanation and about which we entered no quarrel at the
7 time.

8 We waived an indictment and permitted the Govern-
9 ment to move by way of information in August of 1974, and
10 the Government of course filed a notice that they were ready
11 to go to trial on that information as of 1 November; and, as
12 your Honor well knows, a trial date was fixed on this.

13 I cannot conceive of any reason why the Government
14 has at this late stage, on the eve of trial practically --
15 I think, as I understand it, this superseding indictment
16 came down last week. I saw it for the first time yesterday.
17 Last week I was engaged in a military tour at Fort Knox,
18 Kentucky. But, in any event, and I don't seek to adjourn
19 the trial of that information as to the first two counts
20 and I don't want to in any way have the record reflect that
21 I am acceding to any delay in this case, but I am going to
22 at this moment make an application before your Honor that
23 unless the Government can show -- and I cannot conceive of
24 how they can -- the reason for violating the six-month rule
25 as to that third count, I am going to move that that third

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2 count be dismissed.

3 THE COURT: How does it violate the six-month rule?

4 MR. LANNA: Because the Government obviously has
5 never filed any information or any indictment or any accusa-
6 tory instrument as against this defendant. Suddenly they
7 come in here with information they have had --

8 THE COURT: That is not the six-month rule, Mr.
9 Lanna. The six-month rule moves from the time that the
10 arrest on the charge is made. He wasn't charged with this.
11 He is charged with it now. The six months on this charge
12 starts to run from today. I gather it is not barred by the
13 statute of limitations.

14 MR. LANNA: No, it isn't barred by the statute,
15 I am inclined to agree with your Honor.

16 When this defendant was arrested on December 27,
17 1972, by the witness whom I believe will be their star
18 witness, using that terminology, a state trooper of New York
19 State Police, he was arrested and charged in a lower court
20 information with possessing a stolen vehicle. He was charged
21 also with possessing stolen securities.

22 So I think the record should reflect that he was
23 charged by that very police officer with that crime.

24 THE COURT: Not in the federal court.

25 MR. LANNA: Not in the federal court. But within a

1 few days thereafter he was interviewed by investigators
2 of the Federal Bureau of Investigation, and I am sure they
3 were armed with that. So I realize that we are being
4 somewhat technical, but that is the situation.

5 Now I am placed in a dilemma.

6 THE COURT: Any other ground that you want to urge
7 for dismissing this indictment?

8 MR. LANNA: Well, I would move on the additional
9 ground, except that unfortunately I believe the Supreme
10 Court has ruled against us a few years ago, that armed with
11 this knowledge almost two years has expired since that time.

12 But my purpose in not asking for an adjournment
13 was that I didn't want to accede to any delay. On the other
14 hand, I am caught between the proverbial problem of having
15 to move forward now with this third count.

16 THE COURT: I will deny your motion to dismiss the
17 superseding indictment, No. 1. I am prepared, if you are,
18 to try the superseding indictment today. If you are not,
19 I will put it over to December 16. But I will hear the
20 motion to suppress, because I assume that the motion to
21 suppress which you have addressed to the original information
22 would also be addressed to the superseding indictment.

23 MR. LANNA: Oh, yes, sir. I am prepared to move
24 forward.

25 THE COURT: You have your choice now. You can go

forward on the superseding indictment today to completion, or we could put the trial off until December 16.

MR. LANNA: I think we will have to put it off, as much as it grieves me, it really does, but I feel I would be doing an injustice to the defendant.

THE COURT: The trial will be 12/16 at 10 a.m. in this courtroom, which is 1505, with requests to charge and memoranda of law to be submitted by noon on December 9.

How long will your case take, Mr. Davis?

MR. DAVIS: Pardon me, your Honor?

THE COURT: How long will it take you to try this case?

MR. DAVIS: I believe the trial would last two days, your Honor.

THE COURT: The Government's case will take two days.

MR. DAVIS: The Government's case will probably take a day and a half, maybe two days. More likely a day and a half.

MR. NESLAND: Probably, your Honor, by looking at the trial book, I would expect that with picking a jury, with openings, summation, it will take a day and a half. I don't think it will take over a day of testimony with the witnesses

THE COURT: That is the Government. Now Mr. Lanna.

2 MR. LANNA: Well, certainly it would not exceed a
3 day, sir.

4 THE COURT: In other words, it is a two-day trial?

5 MR. NESLAND: I would think that would be a very
6 good estimate.

7 MR. LANNA: I would think so.

8 THE COURT: All right. Because you get down to
9 the end of the year there, you know, and I need every day
10 I can get to try a case.

11 MR. LANNA: If your Honor please, I have the same
12 problem. Even today, just so your Honor is fully aware,
13 in addition to the arguments I have already advanced for
14 the Court I had to come in here today, there is the reason
15 that several weeks ago I had a problem in a state court
16 relative to this engagement, and I had to go before the
17 Appellate Division only ten days ago, and they acknowledged
18 that this engagement before your Honor should have been
19 honored. And of course I felt again in between, if I didn't
20 show, I wanted the record to indicate --

21 THE COURT: I am going to put on the record the
22 castigation of the United States Attorney's office in the
23 case. To have a matter hanging around for this length of
24 time and suddenly on eve of trial to dump a superseding
25 indictment is unheard of and there is no excuse for it. I

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2 am now sitting around with nothing to do for three days.

3 Don't ever let it happen again.

4 Now arraign the defendant on this one.

5 THE CLERK: The United States of America vs.
6 Louis Zaicek.

7 Mr. Zaicek, would you state your full and complete
8 name?

9 THE DEFENDANT: Louis Zaicek.

10 THE CLERK: Louis Zaicek. And the gentleman who is
11 standing on your right, Mr. Lanna, is he your attorney?

12 THE DEFENDANT: Yes, he is.

13 THE CLERK: Mr. Zaicek, do you waive the detailed
14 reading of this indictment and plead not guilty?

15 MR. LANNA: Yes, the defendant does.

16 THE COURT: Do you request bail on the original
17 charge?

18 MR. DAVIS: He was released on his own recognizance.

19 THE COURT: I assume we will have the same bail
20 apply to the superseding indictment as applied to the original
21 indictment.

22 MR. DAVIS: If it please your Honor.

23 MR. LANNA: Thank you, sir.

24 If your Honor please, I don't know what the
25 original bail provided as to the geographical limitation,

because I did not appear with him.

THE COURT: It will be the normal limits of the Southern District of New York.

MR. LANNA: Well, assuming that is all they encompassed, may I ask that he also be permitted to travel to Florida, because he does have employment there. You have no objection to that, I take it?

THE COURT: Mr. Davis?

MR. DAVIS: We have no objection, your Honor.

THE COURT: All right.

MR. LANNA: Thank you, sir.

MR. DAVIS: Are we ready to proceed on the motion to suppress, your Honor?

THE COURT: Yes.

MR. DAVIS: The Government calls George Johansen as a witness.

G E O R G E L. J O H A N S E N, called as a witness

by the Government, being first duly sworn, testified as follows:

THE COURT: You may proceed.

DIRECT EXAMINATION

BY MR. DAVIS:

Q Mr. Johansen, by whom are you employed?

A New York State Police.

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Johansen - direct

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2 Q What is your title and position there?

3 A Investigator.

4 Q Do you work in a specialized unit there?

5 A Yes, sir.

6 Q What is that unit?

7 A Auto theft investigations.

8 Q What is your position in the auto theft investiga-
9 tion unit?

10 A I am the unit coordinator.

11 Q How long have you been with the police department?

12 A Since June of 1967.

13 Q How long have you been in the auto theft investiga-
14 tion unit?

15 A Since June of 1971.

16 Q Mr. Johansen, turning your attention to the month
17 of September 1972, did you have occasion to talk telephonic-
18 ally with a man named Martin Upmal?

19 THE COURT: With whom?

20 Q A man named Martin Upmal, U-p-m-a-l.

21 THE COURT: Yes?

22 A Yes.

23 Q What did Mr. Upmal tell you his job and position
24 was at that time?

25 A Mr. Upmal advised that he was from the Department

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Johansen - direct

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of Motor Vehicles, Title Division, State of Vermont.

Q What to the best of your recollection is the substance of what he said to you at that time?

A Mr. Upmal advised me that a New York resident had been present at the Vermont Motor Vehicle Office with a bill of sale and motor vehicle application, attempting to register a 1972 Cadillac Eldorado as a 1971 Cadillac Eldorado.

Q Did he tell you what had happened at that attempted registration?

A Yes, sir. He advised me that when the individual was challenged he left the office.

MR. LANNA: I am going to object as to the conclusion or the form of the answer.

THE COURT: I will take it.

MR. LANNA: I don't know what he means by "challenged."

THE COURT: This is a suppression hearing. I will take it. Go ahead.

Q Could you continue telling us what the substance was of his report as to what happened when this man attempted to register the car?

THE COURT: He said he left the office.

A He left the office, leaving behind the paperwork.

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Johansen - direct

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2 Q Did Mr. Upmal at that time give you the vehicle
3 identification number of this car?

4 A Yes, sir, he did.

5 Q And you made a note of that?

6 A I did.

7 Q Did he tell you what the license plate numbers were
8 of that car?

9 A Yes, sir.

10 Q And you made a note of that also?

11 A I did, sir.

12 Q Let me return to this report from Mr. Upmal. Did
13 he give the name of the person who had attempted to register
14 his car?

15 A Yes, sir.

16 Q What was that name?

17 A Louis Zaicek.

18 Q And he said that this Louis Zaicek was the person
19 who had attempted to register this car as his own car in
20 Vermont?

21 A Yes, sir.

22 Q Also during December 1972 did you communicate with
23 officials in the Florida Department of Motor Vehicles?

24 A Yes, sir.

25 Q Did they give you a report on the car with the

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Johansen - direct

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identification number given to you by Mr. Upmal?

A Yes, sir.

Q What was their report?

MR. LANNA: Objection, if your Honor please. I realize hearsay is admissible in a suppression hearing.

THE COURT: How are you going to find probable cause?

MR. LANNA: Excuse me, sir?

THE COURT: How are you going to find probable cause?

MR. LANNA: I agree, except that I think he has to be a little more definitive, because otherwise how can I cross-examine him? I mean, to me this is rank hearsay.

THE COURT: It is always rank hearsay.

MR. LANNA: Well, the rankest of rank. I mean, how do we know who he spoke with?

THE COURT: Whom did you speak to, do you know?

THE WITNESS: Yes -- no, sir, I don't know the man's name.

THE COURT: How did you put the call through?

THE WITNESS: I communicated by teletype system to the Department of Motor Vehicles in Tallahassee.

THE COURT: Yes?

THE WITNESS: Requesting --

THE COURT: Information?

THE WITNESS: -- a listing on the Florida license plate, sir.

THE COURT: All right. He did not speak to anybody. He sent a teletype message.

Did you get a teletype answer back or telephone call?

THE WITNESS: Teletype, sir.

THE COURT: Teletype message back.

Q What was the substance of this teletype message that you received?

MR. LANNA: Excuse me, if your Honor please. Wouldn't the best evidence be the message he got back?

THE COURT: If he has it.

But if he does not, I will take his oral representations as to what it was.

Q Do you have a copy of the teletype message you received?

A No, sir.

MR. LANNA: I object to it.

THE COURT: Overruled.

Q Do you recall the substance of that report?

A Yes, sir.

Q What was the substance of that report?

1 A The inquiry was to find out who the owner of
2 this particular vehicle was. The teletype reply indicated
3 that the vehicle was owned by Mainline Fleets of Pompano
4 Beach, Florida, and the license plates were assigned to
5 this particular 1972 Cadillac Eldorado.
6

7 THE COURT: As I understand this, Officer, you
8 say that some fellow in Vermont identified with the
9 Department of Motor Vehicles said a New York resident --

10 THE WITNESS: Yes, sir.

11 THE COURT: -- attempted to register this Cadillac?

12 THE WITNESS: Yes, sir.

13 THE COURT: And he gave you the license plate
14 numbers?

15 THE WITNESS: That's correct, sir.

16 THE COURT: What were the license plate numbers?

17 THE WITNESS: It was a Florida registration tag.
18 I believe it was 10 -- 1052.

19 THE COURT: All right. And that is because it was
20 Florida registration number that caused you to call Florida?

21 THE WITNESS: That caused me to teletype Florida,
22 your Honor, to ascertain who the owner of the vehicle was.

23 THE COURT: All right. You may proceed, Mr. Davis.

24 Q Mr. Johansen, do you recall the entire vehicle
25 identification number of this car?

WC

Johansen-direct

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1 A No, sir.

2 Q Let me ask you to look at this and see if this
3 refreshes your recollection as to what that number was.

4 A Yes, sir, it does.

5 Q Can you please read out the vehicle identification
6 number?

7 A Yes, sir. 6L67S2Q435634.

8 Q Also looking at that, could you please tell me
9 if your recollection is refreshed as to the license plate
10 numbers of the car?

11 A The license plate number was Florida 10E7052.

12 Q And that was the license plate number of the car
13 as to which you made a request for report from the Department
14 of Motor Vehicles in Florida?

15 A Yes, sir.

16 MR. LANNA: If your Honor please, has that document
17 been marked for identification?

18 THE COURT: It can. Mark it for identification.

19 MR. DAVIS: May I have this marked for identifica-
20 tion, please.

21 (Government's Exhibit 1 was marked for
22 identification.)

23 THE COURT: What would you call that document?

24 THE WITNESS: That, sir, is my state police report.

THE COURT: Go ahead.

Q Just to repeat one thing, Mr. Johansen. As I understand it, then, the vehicle identification number and the license plate number of the car as to which you had the report from Mr. Upmal and the car for which you got the report from Florida were the same?

A That's correct, sir.

Q Mr. Johansen, turning your attention to December 27, 1972, were you on duty on that day?

A Yes, sir.

Q Tell the Court, to the best of your recollection, what happened on that day.

THE COURT: What was the day, again?

MR. DAVIS: December 27, 1972.

A On that particular day I had observed this particular 1972 Cadillac Eldorado, bearing the Florida registration plate, parked in a driveway on Roosevelt Drive in the hamlet of Valhalla, New York, which is in Westchester County.

Q What were the license plate numbers of that car which you saw?

A 10E7052.

Q What happened next?

A The car was kept under surveillance by myself and another policeman. A short while later two individuals

1 WC Johansen-direct
2 came from a residence and entered this vehicle. The car
3 started up and started to back out of the driveway onto the
4 roadway. I pulled my police vehicle behind it, dismounted,
5 and approached the driver of the vehicle, identifying myself
6 as a police officer.

7 Q Did you get a good look at the driver of that
8 vehicle at that time and subsequently?

9 A Yes, sir.

10 Q Do you see that man in the courtroom today?

11 A Yes, I do, sir.

12 Q Will you please point him out to me?

13 A The gentleman. --

14 MR. LANNA: We concede identification.

15 Q Then what happened next?

16 A I asked the driver who identified himself as
17 Louis Zaicek to produce a driver's license and registration
18 for the vehicle. He complied by showing me a Florida driver's
19 license and a registration and rental agreement from Mainline
20 Fleets of Pompano Beach, Florida, to Louis Zaicek.

21 MR. DAVIS: I would like this marked as
22 Government's Exhibit 2 for this proceeding, please.

23 (Government's Exhibit 2 was marked for
24 identification.)

25 Q Mr. Johansen, I am giving you what has been marked

wc Johansen-direct

Government's Exhibit No. 2 for identification in this proceeding, and I ask you whether you recognize this document.

A Yes, sir. This is the lease agreement from Mainline Fleets to Mr. Zaicek. This is the document that he presented to me.

Q That is the very document that he presented to you on December 27?

A Yes, sir, it is.

Q How do you recognize it? How do you know that that is the document?

A I remember taking possession of it from Mr. Zaicek.

Q Have you had this in your custody since that date?

A I have, sir.

MR. DAVIS: I offer it in evidence, your Honor.

MR. LANNA: May I have a moment, if your Honor please.

THE COURT: Yes.

(Pause)

MR. LANNA: No objection.

(Government's Exhibit 2 was received in evidence.)

MR. DAVIS: May I proceed, your Honor?

THE COURT: No. I am reading the agreement.

There is no year on this, is there?

THE COURT: All right.

(Government's Exhibits 3, 4 and 5 were marked
for identification.)

Q Mr. Johansen, I am giving you what has been
marked Government's Exhibit 3 for identification in this
proceeding. Do you recognize this?

A Yes, sir.

Q What is that, please?

A This is a Florida registration certificate for a
1972 Cadillac, Eldorado.

Q Does that registration certificate have on it the
vehicle identification number of the car?

A Yes, sir, it does.

Q Could you read that number, please?

A Yes, sir. 6L67S2Q435634.

Q When is the first time that you saw this document?

A On December 27, 1972.

Q Is this the registration certificate that Mr.
Zaicek gave to you at the time when you accosted him?

A Yes, sir.

THE COURT: That is a registration certificate
for 1972 Cadillac?

1 THE WITNESS: Yes, sir.

2 THE COURT: Is that the same identification
3 number as appears on Exhibit 2, the lease agreement?

4 THE WITNESS: Yes, sir.

5 THE COURT: All right.

6 MR. DAVIS: I offer it, your Honor.

7 THE COURT: Any objection?

8 MR. LANNA: No objection.

9 (Government's Exhibit 3 was received in
10 evidence.)

11 X Q Mr. Johansen, I am giving you what has been
12 marked Government's Exhibits No. 4 and 5 for identification
13 in this proceeding. Do you recognize these?

14 A Yes, sir.

15 Q What are they?

16 A They are two State of Florida driver's licenses
17 in the name of Louis Zaicek. Exhibit No. 4 lists a residence
18 of 915 North Ocean Drive, Hollywood; Exhibit 5 lists a
19 residence of 345 Cleveland Street, Hollywood, Florida.

20 Q And the name in each of those driver's licenses
21 is Louis Zaicek?

22 A Yes, sir.

23 Q Can you see from the driver's license what the
24 expiration date of the license is in each one?
25

1 A On Exhibit 4, the expiration date is 10/31/73.

2 THE COURT: What? 10/31/73?

3 THE WITNESS: Yes, your Honor.

4 A No. 5, it's the same expiration date, 10/31/73.

5 Q Are these the licenses that Mr. Zaicek gave to
6 you at the time when you accosted him?

7 A Yes.

8 Q On December 27, 1972?

9 A Yes.

10 THE COURT: Gave you two driver's licenses?

11 THE WITNESS: Yes, sir.

12 MR. DAVIS: I offer it, your Honor.

13 MR. LANNA: No objection.

14 (Government's Exhibits 4 and 5 were received in
15 evidence.)

16 MR. DAVIS: May I proceed, your Honor?

17 THE COURT: No.

18 (Pause)

19 THE COURT: All right. Go ahead.

20 Q Mr. Johansen, you have just testified that this man
21 Louis Zaicek was seen by you getting into this car, you
22 stopped him, and he gave you the documents that have just
23 been admitted into evidence. What happened next, to the best
24 of your recollection?
25

1 A I advised Mr. Zaicek that the vehicle had been
2 reported overdue from Mainline Fleets in Pompano Beach,
3 Florida; that my investigation had showed a payment on the
4 lease was voided, a check was written with insufficient
5 funds.

6 Q At that time did you warn him of his constitutional
7 rights?

8 A No, sir.

9 Q What happened after this conversation with him?

10 A Mr. Zaicek advised me that he had taken care of
11 the matter and that he had mailed payment to Mainline. He
12 requested that I accompany him back to the house and telephone
13 Mainline Fleets in Pompano Beach and clear the matter up.

14 Q Did you do this with him?

15 A Yes, sir, I did.

16 Q Where did you make the telephone call from?

17 A It was the residence from which he had just come
18 out of. I believe the man's name, the last name was Battia,
19 B-a-t-t-i-a.

20 Q Tell the Court, to the best of your recollection,
21 the manner in which you made this phone call and the sub-
22 stance of the conversation.

23 A Yes, sir. I spoke to a man who identified
24 himself as Richard Ronan.

25 Q Where did you make the phone call to?

 A To the office of Mainline Fleets, in Pompano

1 wc Johansen-direct

2 Beach, Florida.

3 Q Continue, please.

4 A Mr. Ronan, I believe, identified himself as the
5 vice-president of the corporation. I advised Mr. Ronan
6 that I had stopped this particular vehicle, and I was in
7 the presence of Mr. Zaicek. Mr. Ronan advised me that he
8 wished to recover the property. He further advised me that
9 he had received a check that bounced for payment. And he
10 further advised me that he had received telephonic communica-
11 tion indicating that the car had been -- that Zaicek had
12 attempted to --

13 MR. LANNA: As to this latter portion, I am going
14 to object. There we are dealing with double hearsay.

15 THE COURT: It is the same single hearsay.
16 Overruled. Go ahead.

17 Q Continue, please.

18 A He advised me that Zaicek had attempted to
19 register his company's vehicle in his own name in the State
20 of Vermont.

21 Q Did Mr. Ronan make a request to you at that time?

22 A Yes, sir. Mr. Ronan asked me if Zaicek was in
23 my presence, and I stated to the affirmative. And Mr. Ronan
24 requested that I arrest Zaicek.

25 Q What did you do after this telephone conversation?

2 A I arrested Louis Zaicek and advised him of his
3 constitutional rights as set forth by Miranda warnings.

4 Q How did you read him his rights? Were you
5 reading from a piece of paper?

6 A No, sir, from my memory.

7 Q Can you remember what rights you advised him of
8 at that time?

9 A Yes, sir.

10 Q Will you tell the Court, please?

11 A I advised him that he was under arrest for
12 possession of stolen property. I advised him, "You have
13 the right to remain silent. Anything you say can and will
14 be used against you in a court of law." I advised him he
15 had a right to speak with an attorney, and in the event he
16 could not afford one the courts would provide one for him.
17 I asked him if he understood what I had just told him.
18 He stated he did.

19 Q Did he in fact appear to you to understand
20 everything that you had said to him?

21 A Yes, sir, he did.

22 Q Then what happened, what did you do after this
23 arrest?

24 A Mr. Zaicek was taken from the house in my custody
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Johansen-direct

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2 and placed in my police vehicle. The other police officer
3 that was with me drove the Cadillac behind my vehicle to
4 the State Police Barracks at Hawthorne.

5 Q Had you impounded the vehicle at that point?

6 A Yes, sir.

7 Q Does that mean that you had taken complete
8 custody and control over the vehicle yourself?

9 MR. LANNA: Objection, your Honor, to leading.
10 I think the Government is beginning to testify.

11 THE COURT: True.

12 Q What did you do with respect to the car at
13 that time?

14 THE COURT: He said the officer drove the car
15 back to the barracks.

16 Q What happened when you got back to the barracks?

17 A Sir, at the barracks the vehicle was locked in
18 my presence and the keys given to me. I then went inside to
19 the office with Mr. Zaissek, the other police officer and
20 the other gentleman, Battia.

21 Q When a vehicle is found to have been stolen and
22 is taken to the police station in this manner, what are the
23 normal procedures in your unit for dealing with the vehicle?

24 A The vehicle is secured, and all of the articles
25 inside are inventoried. They are either turned over to the

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recipient of the stolen car or they are kept with the car and returned to the last owner.

Q And that is what is normally done in the regular course of operations in your unit?

A Yes, sir.

Q What are the purposes for such inventories?

A The on-the-spot inventory is done in order to prevent any claims being made at a later date that valuables would be left behind, valuables of the last recipient.

Q Are there any other purposes that come to your mind?

A Also to separate or segregate the component parts of the vehicle.

THE COURT: What does that mean?

THE WITNESS: Sir, possibly a spare tire or stereo tape deck, any accessories that would belong with the car.

THE COURT: What do you do, take them out of the car?

THE WITNESS: No, sir. I will determine if they belong with the car or if they are the property of the person that has it. Many times we will find a breakaway tape deck, which can be valued at considerable sum. We will determine whether or not it is factory equipment, and in some

cases we will even call to find out when the car was stolen what accessories were in the car.

THE COURT: Would you let me know what is meant by breakaway equipment?

THE WITNESS: Sir, what they call breakaway is, a tape deck, for instance, that can be mounted beneath the dash board of the vehicle in view and can be removed with a key when the car is left on a street, it can be removed readily and placed in the trunk, out of sight.

Q Mr. Johansen, what happened next after you had returned to the station house?

A Mr. Battia, Mr. Zaicek's associate, was concerned. He claimed he had belongings in the vehicle.

Q Had Mr. Battia been arrested at that point?

THE COURT: How do you spell his name?

THE WITNESS: I believe, your Honor, it's B-a-t-t-i-a.

Q Had Mr. Battia been arrested at that point?

A No, sir.

Q What did he say to you?

A Well, he was informed that Zaicek would be kept at the barracks and processed. And at this time he wanted to leave and asked that his personal property be returned to him.

Q What did you do?

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A I directed two police officers to accompany Mr. Battia back to the vehicle and return Battia's property to him.

Q What happened next?

A A short while later the two police officers came back to the office. One officer handed me a .38 caliber revolver; the other officer handed me an attache case. Inside the attache case was a brown paper bag containing a quantity of stocks and bonds.

Q How had the officers gotten the keys to the car at that point?

A I gave them to them.

Q Did they tell you where they had found the gun that you have just described?

A Yes, sir.

Q Where did they say they had found it?

A The gun was recovered from the glove compartment of the vehicle.

Q Did they tell you where they had found the attache case?

A Yes, sir.

Q Where was that?

A The attache case was recovered from the trunk compartment.

MR. DAVIS: I have no further questions.

MR. LANNA: May I have the police report, please, the grand jury testimony.

MR. DAVIS: I don't think 3500 applies here.

THE COURT: That is right, Mr. Lanna.

You say the case had a brown paper bag?

THE WITNESS: That's correct, sir.

THE COURT: What was in the brown paper bag?

THE WITNESS: It was a quantity of municipal bonds and stocks.

MR. LANNA: If your Honor please, you have to bear with me. This is very difficult to read, the reproduction. I have to go over by the window.

THE COURT: All right.

(Pause)

MR. LANNA: I am ready to proceed, sir.

CROSS-EXAMINATION

BY MR. LANNA:

Q Investigator Johansen, is it your testimony that your first being alerted to this vehicle was as a result of a conversation you had with Vermont authorities?

A That's correct, sir.

Q And they contacted you?

A Yes, sir.

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Q Who contacted you?

A A man named Upmal.

Q Upmal.

A Yes, sir.

Q Do you have any official memoranda in connection with that contact?

A No, sir.

Q You didn't make any notes on it?

A No, sir, other than my police report.

Q Your police report. And he is the one who told you about this incident where a person by the name of Louis Zaicek -- right? Didn't he give you the name Zaicek?

A Yes, sir.

Q -- came to register ostensibly a 1971 Cadillac; right?

A Yes, sir.

Q And he had discovered, according to what you told us, it was really a '72 Cadillac?

A Yes, sir.

Q Did he tell you how he discovered that?

A Yes, sir.

Q How?

A He advised me that on the back of the rental agreement, where the lessee would sign, it was signed twice,

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Johansen-cross

the second time to represent the lessee as the owner of the vehicle.

Q In other words, he showed him the lease of this vehicle?

A I was advised that he was presented with a bill of sale, a registration, a rental agreement, indicating or reflecting that the vehicle was signed over to the individual, and the motor vehicle application for the registration in Vermont was in error due to the fact that one set of papers were for a '72 vehicle and the application for the Vermont registration was for a '71 vehicle.

Q I show you Government's Exhibit 2 in evidence. That is the lease agreement which was exhibited to you by Mr. Zaicek on the day you arrested him, I think that was December 27 of 1972; right?

A Yes, sir.

Q And on the back it does have two signatures, does it not?

A Yes, sir.

Q Did you question Mr. Zaicek about that at all?

A I did, sir.

Q As a result of that question, did you then make any inquiry of Vermont to see if this was the instrument which had been shown to them up there?

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A You mean did I call Vermont back?

Q Yes.

A No, sir.

Q Did you ask Mr. Zaicek if this was the instrument he had shown them up there?

A Not during the initial encounter with Mr. Zaicek, sir.

Q Did there come a time when you did ask him?

A Yes, sir.

Q When was that?

A At my office after he had been placed under arrest.

Q Did he indicate to you that he had shown them this particular document?

A I don't recall if he mentioned this particular document, sir.

Q How many documents, to your knowledge, did he have relative to the use of this car?

A He had the registration from Florida and this document.

Q Right.

A I don't know what he left in Vermont.

Q You mean you made no inquiry as to what he left in Vermont?

1 A No, sir. I was concerned with determining --

2 Q No, I did not ask you that. Just answer my
3 question yes or no.
4

5 Q No, sir.

6 Q All right. Then it is your testimony you don't
7 know what if anything he left in Vermont?

8 A That's correct, sir.

9 Q Right. And you never made any further inquiry
10 about it, right?

11 A Not at that particular time, sir.

12 Q Did they give you a description of Mr. Zaicek?

13 A Yes, sir.

14 Q Did the description fit the description as you
15 observed him on December 27 of 1972?

16 A Yes, sir.

17 Q Did he deny that he went to Vermont to you?

18 A At first, sir.

19 Q But he eventually told you he did go to Vermont,
20 isn't that so?

21 A Yes, sir.

22 Q The numbers which were given to you by the
23 Vermont authorities coincided with the lease agreement, did
24 they not?

25 A Yes, sir, they did.

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Q May I have that back, please.

A Yes, sir.

Q Officer Johansen, is it your testimony that when you searched this car or when this car was searched, it was done at police headquarters after the arrest and the transporting of Zaicek to the barracks?

A Yes, sir, it is.

Q All right.

A Yes, sir.

Q Is it your testimony that this was done as an inventory?

A It initially was done to --

Q No, I did not ask you that. Just answer the question yes or no. If you cannot answer it, say you cannot answer the question.

A I don't understand the question, sir.

THE COURT: You did not search the car before you went through the procedures of inventory. You searched the car because Battia said he wanted the property back.

A That's right.

THE COURT: So it had nothing to do with an inventory.

Q That is why you searched the car?

A I didn't search the car.

1 THE COURT: The car was searched because Battia
2 says he wanted his property back.
3

4 Q In other words, then, that is your testimony.
5 That is the reason that the car was searched.

6 A Yes, sir.

7 Q Where was Battia's property?

8 THE COURT: Did he indicate to you --

9 THE WITNESS: Yes, sir.

10 THE COURT: -- where his property was?

11 THE WITNESS: Yes, sir.

12 THE COURT: What did he say?

13 THE WITNESS: He indicated that his property was
14 in the car.

15 THE COURT: Did he tell you what the property
16 consisted of?

17 THE WITNESS: Clothing, sir.

18 THE COURT: Clothing?

19 THE WITNESS: Yes, sir.

20 Q Did he say where it was?

21 A At that particular time I don't recall, sir.

22 Q I think you have indicated to us that you found
23 a weapon in the glove compartment.

24 A There was one gun, sir.
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Q Which incidentally you discovered was registered in Florida, isn't that so?

A I never found that it was registered in Florida, sir.

Q You were not told that?

A No, sir, I wasn't.

Q But in any event did Battia tell you that he had clothing in the glove compartment?

A No, sir, he did not.

Q You found the attache case with the brown paper bag which contained within it the securities in the trunk; right?

A Yes, sir.

Q Did Battia tell you the clothes were in the trunk?

A I don't recall where he stated the clothes were, sir.

Q But despite the fact that Battia told you he wanted his property back and that was accomplished and he told you it was clothing, you arranged to go into the glove compartment --

THE COURT: He did not arrange to do anything.

Q You took a gun out of the glove compartment --

THE COURT: He took nothing out of the glove compartment. He wasn't there.

1 Q Your brother officers took a gun out of the
2 glove compartment, right?

3 A That's correct, sir.

4 Q And the attache case out of the trunk.

5 A Yes, sir.

6 Q That is the reason that that car was gone into,
7 is that correct?

8 A I don't quite understand you, sir.

9 THE COURT: You testified here that Mr. Battia
10 came to you and said he wants his property back, it is in
11 the car.

12 THE WITNESS: Yes, sir.

13 THE COURT: So you gave the keys to two of your
14 fellow officers and told them to take Battia to the car and
15 give him his property back.

16 THE WITNESS: That's correct.

17 THE COURT: The next thing you know is, they
18 come back to you with a gun and an attache case.

19 THE WITNESS: Yes, sir.

20 THE COURT: That is all he knows.

21 MR. LANNA: Very well.

22 THE COURT: I gather.

23 Do you know anything else?

24 THE WITNESS: No, sir.

1 Q You did not search the car as an incident to an
2
3 arrest, then?

4 A No, sir.

5 Q I show you Government's Exhibit 1, I believe it
6 is, for identification and ask if you recognize that
7 document.

8 A Yes, sir.

9 Q Would you tell the Court what that document
10 purports to be?

11 A This is a New York State Police arrest report and
12 investigative report. It is my report.

13 Q It is your report.

14 A Yes, sir.

15 Q It is over your signature, is it not?

16 A Yes, sir, it is.

17 Q Did you fill that report out?

18 A Yes, sir, I did.

19 Q May I have it just one more time, please.

20 Referring you to page 2 of this report, on the
21 bottom thereof, is there a narrative of the sequence of
22 events which occurred on December 27 of 1972?

23 A Yes, sir.

24 Q And, oh, about half way through, would you read
25 it to yourself, relative to the manner in which the search

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Johansen-cross

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2 was effected.

3 A Yes, sir.

4 Q Would you be kind enough to tell the Court how
5 you have described the purpose for the search in that
6 document?

7 A Yes, sir. The sentence starts "Search of vehicle
8 incidental to arrest produced weapon, package of nine
9 negotiable securities recovered in T-1's attache case in
10 vehicle." T-1 would be the defendant, sir. This is a
11 terrible copy.

12 Q It is, I agree; that is why I had to go by the
13 window.

14 MR. DAVIS: There is a better copy here.

15 MR. LANNA: Thanks. Now he tells me there is a
16 better copy.

17 MR. DAVIS: This is the one that is admitted in
18 evidence.

19 MR. LANNA: Oh, all right. It isn't much better.

20 Q All right, without reading any more, is there any
21 other reference to the search in there, aside from the fact
22 that you state on there it was as an incident to an arrest?

23 A No, sir.

24 Q Is there anything in there about the fact that
25 the other gentleman -- I forget his name right now -- wanted

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Johansen-cross-redirect

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2 his property and as a result the car was gone into for that
3 reason?

4 A No, sir.

5 Q Is there anything in there that indicates that
6 the search took place as a result of your policy as brought
7 out by the Government in your direct examination of inventory-
8 ing the car?

9 A No, sir.

10 MR. LANNA: I have no further questions, sir.

11 THE COURT: Redirect?

12 MR. DAVIS: Just a few questions, your Honor.

13 REDIRECT EXAMINATION

14 BY MR. DAVIS:

15 Q Mr. Johansen, you have testified that when Battia
16 requested that his property be returned to him that you
17 gave the keys to two officers and that they went out to
18 the car to retrieve Battia's property.

19 MR. LANNA: I am sorry, I was unable to hear you.

20 MR. DAVIS: I will start over again.

21 Q Mr. Johansen, you testified that at the time that
22 Battia requested that his property be returned to him, you
23 gave the keys to the car to some of your brother officers and
24 they went out with Battia to the car; is that correct?

25 A Yes, sir.

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Johansen-redirect

2 Q At that time did you have an obligation under
3 your normal operating procedures to make sure exactly --

4 THE COURT: What is that statement? You are
5 just dreaming this up.

6 MR. DAVIS: I am trying to determine his obliga-
7 tion at that time.

8 THE COURT: I don't care what they did. All this
9 man can tell you is that he told these two officers to go
10 out to the car with Battia for the purpose of giving the
11 property of Battia back to him. He did not tell him to go
12 out and inventory the car.

13 Q Mr. Johansen, you testified earlier --

14 THE COURT: Get one of the other two men here
15 to testify. He cannot tell you anything.

16 Q Mr. Johansen, you testified earlier that the
17 normal procedure in your office is to become aware of
18 everything in the car.

19 THE COURT: Absolutely. He has so testified.
20 But he did not say here, "That is why they went out to the
21 car, to inventory it."

22 MR. DAVIS: I am not asking him that, your Honor.

23 THE COURT: Well, if you don't, that is the only
24 question you can ask him that would mean anything. Get one
25 of the other two officers here to tell what they did.

Q Mr. Johansen, after the events about which you just testified, did you have any further contact with the car?

A Yes, sir.

Q What did you do?

A I personally inventoried the belongings that were inside the car.

Q Did you look through the entire contents of the car at that time?

A I did, sir.

Q What was the purpose of that search?

A To recover property that was purportedly owned by the defendant.

Q When was that?

MR. LANNA: Your Honor, I am going to object to this as being immaterial.

THE COURT: Sustained.

MR. DAVIS: No further questions, your Honor.

THE COURT: The issue on this hearing ends when they give him the gun and the bag. All right.

MR. DAVIS: Your Honor, before he leaves, I would like to make one request. The Government may well introduce into evidence at a point in the trial statements made by the defendant to Mr. Johansen, and the only statements

1 we would introduce are ones that were made after he was
2 read his warnings of Miranda. I just want to alert the
3 defense counsel and yourself of that in case there are any
4 further questions as to the statements.
5

6 THE COURT: I don't know what you are talking
7 about. I am conducting a suppression hearing. Your duty is
8 to show that the property seized was properly seized.

9 MR. DAVIS: Your Honor, in his motion for a bill
10 of particulars he asked to have suppressed any statements
11 made by the defendant in contravention of the various Supreme
12 Court decisions.

13 THE COURT: I thought your statement was in
14 relation to the property that was seized.

15 MR. DAVIS: No, your Honor. I just want to give
16 the Court and defense counsel this opportunity before trial
17 so we don't have to hold up trial, so that you may make a
18 ruling if you wish as to the admissibility of these state-
19 ments, wholly apart.

20 THE COURT: Let us finish one thing at a time.

21 MR. DAVIS: I just want to bring this to your
22 attention while the witness is on the stand.

23 THE COURT: We will keep him around here until
24 we get to the other part of the motion.

25 MR. DAVIS: Fine. No further questions, your

1 WC Johansen-redirect

2 Honor.

3 THE COURT: Wait around, will you?

4 THE WITNESS: Yes, sir. Am I excused, your
5 Honor?

6 THE COURT: You can sit in the courtroom. I
7 don't know how long it is going to take. It should not take
8 long.

9 THE WITNESS: Thank you.

10 (Witness excused)

11 THE COURT: Next witness.

12 MR. DAVIS: The Government calls Martin Upmal.

13 THE COURT: I don't think you need this witness.

14 MR. DAVIS: Your Honor, if I can discuss the law
15 very briefly, there are cases that hold that when a police
16 officer receives a report, there has to be some demonstration
17 of the reliability of that report. In other words, a police
18 officer cannot just say, "Yes, I received a call from someone
19 and that call gave me probable cause."

20 THE COURT: You have got here a telephone call
21 made at the defendant's request to Mainline. That is the
22 basis for the arrest, isn't it?

23 MR. DAVIS: The basis for the arrest, your Honor,
24 is two things: one is we have a call from Mainline; second,
25 he had a call with Mr. Upmal.

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Upmal-direct

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2 THE COURT: You mean that the arrest would have
3 been made without Mainline having said, "Arrest this man"?

4 MR. DAVIS: It may have been made, but Mr.
5 Johansen, for various reasons, wanted to find out exactly
6 what he knew.

7 THE COURT: All right.

8 M A R T I N E. U P M A L, called as a witness by the
9 Government, being first duly sworn, testified as
10 follows:

11 DIRECT EXAMINATION

12 BY MR. DAVIS:

13 Q Mr. Upmal, I would like you to turn your attention
14 to the month of December 1972 and tell me what was your
15 occupation at that time.

16 A I was director of title and antitheft for the
17 Department of Motor Vehicles for the State of Vermont.

18 Q How long had you been in that office at that time?

19 A Since the beginning of the program in October 1971.

20 Q During that month -- and I am talking about
21 December 1972 -- did you have occasion to meet an individual
22 named Louis Zaicek?

23 A Yes, I did.

24 Q Do you see that person in the courtroom today?

25 A Yes, sir.

1 wc Upmal-direct

2 Q Could you point him out to us, please?

3 A The gentleman in the red jacket here.

4 MR. DAVIS: May the record reflect the
5 identification of the defendant.

6 THE COURT: All right.

7 Q Tell the Court to the best of your recollection
8 the circumstances of your encounter of Mr. Zaicek.

9 A Well, I met him at one of the service counters
10 of the Motor Vehicle Department, what we call a window.
11 It happened to be the tax window where he was attempting to
12 register and pay the tax on a Cadillac automobile. And at
13 the time the vehicle identification number on the vehicle
14 didn't match the model year on the application form. And a
15 lady who was waiting on the counter was under instructions to
16 contact my office if such a thing came up, because it was in
17 our activities to take care of these type of matters. And
18 it happened to be that particular day that the investigator
19 who normally takes care of that was on vacation, he had gone
20 down to Arkansas for Christmas holiday, and therefore I
21 took care of it personally. I went to the window and talked
22 to the gentleman, explained to him the discrepancy between
23 the serial number and the year, model year.

24 Q Did this gentleman give you respiration forms that
25 he had filled out?

1 wc Upmal-direct

2 A It's on here, yes.

3 Q On the card?

4 A Yes.

5 MR. DAVIS: I offer it, your Honor.

6 MR. LANNA: No objection.

7 (Government's Exhibit 7 was received in
8 evidence.)

9 Q Mr. Upmal, I am giving you what has been marked
10 Government's Exhibit 6 for identification and ask you if
11 you can identify that.

12 THE COURT: Would you tell me why you do it
13 backwards?

14 MR. DAVIS: I gave them both to the clerk, your
15 Honor. I did not realize what number he was assigning to
16 them.

17 THE COURT: Go ahead.

18 A Yes, I recognize that. That is a Vermont purchase
19 and use tax form relative to the same vehicle.

20 Q Is this the one that the defendant Louis Zaicek
21 gave to you in the month of December?

22 A That has double identification on it, because it
23 also has the tax clerk's symbol on it, roman number IV here,
24 which belongs to the lady that I mentioned, who called me,
25 and mine is out on the border here.

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Upmal-direct

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2 MR. DAVIS: I offer it in evidence.

3 MR. LANNA: No objection.

4 (Government's Exhibit 6 was received in
5 evidence.)

6 MR. DAVIS: May I proceed, your Honor?

7 THE COURT: Yes.

8 Q Mr. Upmal, is your testimony, then, that Louis
9 Zaicek gave you these two documents that you just recognized
10 and identified?

11 A They were presented at the department's window to
12 the lady in question, and she had them there on the counter
13 when I came to examine them. They are the same two docu-
14 ments that I looked at.

15 Q Looking at these documents, do they indicate that
16 this person was attempting to register this car at that time?

17 A Yes. This is an application for registration which
18 bears a statement relative to that fact.

19 Q What do these documents indicate is the name of
20 the owner registering the car?

21 A Louis Zaicek

22 Q Do the documents have on it the vehicle identifi-
23 cation number of the car?

24 A They do.

25 Q Can you read that number, please?

A I have to get my glasses.

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Upmal-direct

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2 MR. LANNA: I will concede that the identification
3 number is the same as appears in the lease. I have examined
4 them. I thought we might move along that way.

5 THE COURT: All right.

6 Q Do these documents give the year number of that
7 car?

8 A They do. '71, yes.

9 Q Looking at the vehicle identification number, can
10 you tell whether that was or was not a 1971 car?

11 A The vehicle identification number indicates that
12 it is a 1972 vehicle, and this is the reason that I was
13 brought into the matter in the beginning.

14 Q Mr. Upmal, what did you do after your encounter
15 with Mr. Zaicek?

16 A Well, I explained to him that there was more required
17 for the registration of a '72 vehicle, and since the vehicle
18 identification number indicated it was a '72, that the
19 model year was incorrect, and that he would have to get
20 further documentation before he could register the vehicle.
21 At which time he left. And the documents were retained by
22 the department at that time.

23 I returned to my office, where I called the
24 Cadillac Motor Division, Northeastern Division, in Chestnut
25 Hill, in Boston, and gave them the vehicle identification

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2 number and asked them for a verification on a selling dealer
3 and owner of record. And a little bit later that day, on
4 towards the end of the day, I received a call from them
5 indicating that it had been sold through a dealer in --
6 I can't remember the dealer's name now -- but it had been
7 sold to the Mainline Fleet Leasing. And it was as far as
8 they knew in Florida.

9 Q Mr. Upmal, subsequent to these events did you
10 have an occasion to talk by telephone with a New York State
11 police officer?

12 A I did receive a call, I don't know the exact date
13 or can't remember the officer's name in question, because I
14 had a great many of such calls.

15 Q But do you remember roughly when this call was?

16 A I would say a week or so later or maybe a few days
17 later.

18 Q Was this during the month of December 1972?

19 A Yes, sometime along before Christmas. I know.

20 Q Did you tell this officer on the phone the
21 events in a general manner that you have just testified about
22 here?

23 A Yes, I did.

24 MR. DAVIS: No further questions.
25

CROSS-EXAMINATION

BY MR. LANNA:

Q Mr. Upmal, my name is Lanna; I represent Zaicek. Is it your testimony that after you observed the discrepancies you discussed these discrepancies with Mr. Zaicek?

A Yes, I did.

Q And you pointed out to him that this identification number really from your experience --

A Should have been on a '72.

Q -- should be on a '72. And that he would require some additional documentation or something?

A Right.

Q And he just left, right?

A He said he was going to get such documentation, he would get it.

THE COURT: What additional documentation did he need?

THE WITNESS: Well, because it was a '72 model vehicle coming from a foreign state, in other words coming from New York, he gave a New York address, and the vehicle did not come through our dealers in the State of Vermont, he would either have to provide a statement of origin if it came from a nontitle jurisdiction or he would have to provide a title if it came from a title jurisdiction. And he seemed

1 willing to go and obtain these documents. He indicated that
2 he would.

3
4 Of course, it's our policy under these cases to
5 check on things like this. We like to make a check on it.
6 And that is what I did at that time. And once I found out
7 who the owner of record was, I contacted them directly.

8 Q You did not contact Officer or Investigator
9 Johansen, did you?

10 A No.

11 Q He contacted you?

12 A He contacted me. Of course, copies of this
13 document were turned over to the Federal Bureau quite
14 quickly, because that is our policy in all these cases. And
15 one of the agents from the Burlington office picked him up.

16 Q And the documents that were left with you I think
17 were Exhibits 6 and 7, the documents which pertain to your
18 motor vehicle operation of business?

19 A Right.

20 MR. LANNA: All right.

21 May I just have a moment.

22 Q Were there any other documents exhibited to you
23 aside from these two?

24 A He did have a bill of sale, handwritten bill of
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sale.

MR. LANNA: Could we have that produced if you have it?

MR. DAVIS: Yes (handing to Mr. Lanna).

MR. LANNA: Could we have this marked for identification, please.

(Defendant's Exhibit A was marked for identification.)

Q I show you Defendant's Exhibit A for identification.

A Yes.

Q Do you recognize that document?

A Right, yes.

Q What is it?

A Well, it's a handwritten bill of sale for \$5,000 for the vehicle in question. And I also put my mark on here, on the lower left-hand corner.

Q As best you can recall, is this the document, especially in view of your own identification on it or legend, that was turned over to you along with the other two documents?

A Well, these documents were retained at that time at that window, and I am not sure whether he said he was going out to the car to get the further documentation or he

would be back the next day. But anyway they were left behind.

Q But what I mean is, this is one of the documents?

A That is the one that was left behind. The reason I am not absolutely sure of it, because it was some time ago.

Q But you are sure this is one of the documents?

A Oh, yes. It has my own mark on there.

Q It has your legend on it for identification?

A Right.

MR. LANNA: I have no further questions.

MR. DAVIS: No further questions.

THE COURT: If this had been a 1971 car, would you have registered it, or did you still need the certificate of origin?

THE WITNESS: Well, the Vermont title law, which I was very closely involved with, became effective on July 1, 1971, as to all 1972 or later model vehicles. So consequently a '71 vehicle did not come within the universe of our titling requirements. Therefore, '71 could be registered with no more than what was presented at the counter.

However, because of the traffic in stolen Cadillacs, we instigated a program to check all VIN's, because a great many '72's were being represented as '71's to sneak

1 them through our registration system at that time. And all
2 of our counter personnel had been posted to this. We had
3 drawn up, with the help of the Cadillac Division, we had
4 drawn up some criteria on editing vehicle identification
5 numbers, which later was expanded to take in most of the
6 major VIN's. But we started with the Cadillacs at this time
7 because they were the primary vehicle we were running into,
8 and this was one of the typical case of a vehicle identifica-
9 tion number identifying the vehicle beyond the other given
10 facts, which indicated to us something more had to be done,
11 and we had criteria for that which was developed and was
12 very successful in preventing the registration of vehicles
13 without proper documentation.
14

15 THE COURT: Thank you. You are excused.

16 MR. DAVIS: No further questions.

THE COURT: You may step down.

18 (Witness excused)

19 THE COURT: Next witness.

20 MR. DAVIS: We have no further witnesses, your
21 Honor.

22 THE COURT: Mr. Lanna?

23 MR. LANNA: Defendant rests.

24 THE COURT: Do you want to make any argument?

25 MR. LANNA: If your Honor please, the defendant at

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Upmal-cross

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2 this point would move that the relief sought be granted, that
3 is, namely, the suppression of the tangible evidence -- I
4 am speaking now of the securities in question under Counts 1
5 and 2. Here we have a situation where -- I don't know if
6 your Honor has had an opportunity to examine the memorandum
7 which I have supplied.

8 THE COURT: I read yours and I read the Govern-
9 ment's original. The Government has just handed up another
10 one.

11 MR. LANNA: There is another one. I will make
12 a few comments relative to that in a moment.

13 However, and I think I properly stated it, although,
14 I was anticipating, that even assuming -- and here we are
15 only dealing with probable cause, of course -- but even
16 assuming that Officer Johansen, of which I have some
17 question, but assuming that on December 27 of 1972 Officer
18 Johansen had probable cause to believe that this vehicle was
19 stolen -- and really he is relying on, in my humble opinion,
20 the flimsiest of evidence at this particular point.

21 THE COURT: He called Florida at the defendant's
22 request.

23 MR. LANNA: Right. And Florida said, we are
24 assuming, that the other end said to him, "Look, arrest the
25 guy, he has been giving us bad checks." Well, that doesn't

1 mean this is a stolen car. That means that he owes them
2 money down there. And I think that there might be a good
3 contractual dispute.
4

5 THE COURT: That may be, but it may add up to
6 enough to justify an arrest.

7 MR. LANNA: Right.

8 THE COURT: I think the arrest here was good.

9 MR. LANNA: Right, and that is why I assume that
10 state of facts in my memo.

11 THE COURT: Go on from that point.

12 MR. LANNA: All right. However, it is further
13 my impression that the search here -- and to me that is
14 exactly what it was -- was illegal under the authorities as
15 given by the Government. And I hoped I explained them away
16 to your Honor, and I read them very carefully. Here we
17 have several aspects.

18 The Government changes its posture, it seems, as
19 this case goes along. If you read the initial memo submitted
20 by the earlier assistant, it leaves us with the absolute
21 impression that immediately after Mr. Zaicek is arrested
22 this vehicle was searched. It does not say anything about
23 an inventory, it does not say anything about this passenger,
24 and in fact nowhere in any of the documentation do we ever
25 hear anything about that until today, which is, I guess,

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Upmal-cross

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2 November 13 of 1974. And suddenly we find both from the
3 testimony of Investigator Johansen as well as the legal
4 memo submitted to your Honor today -- and even there we
5 run into a conflict, because the legal memo talks about an
6 inventory search, says nothing at all about the passenger,
7 and suddenly we find from Johansen that there was no inventory
8 search, at least up to the point where the articles were
9 taken.

10 THE COURT: None that he knows of.

11 MR. LANNA: None that he knows of. And in fact
12 his police report says exactly what the initial memo of
13 the Government indicated and that was that this was a search
14 incident to an arrest.

15 I submit to your Honor that if this was a
16 search incident to arrest, the authorities which I have
17 advanced to your Honor in my legal memo I think are controlling.
18 I think it was an illegal search, and the fruits of that
19 search should be suppressed.

20 THE COURT: Mr. Davis?

21 MR. DAVIS: Your Honor, it is the Government's
22 position that this is basically a very simple search, for
23 these two reasons. First, everyone appears to agree that
24 there is ample probable cause for the arrest, and I don't
25 need to go into that further, unless you have questions.

1 Once the man was arrested and the car was
2
3 impounded, the police officers had total control and custody
4 over that car. They could come and go into the car as
5 they willed without --

6 THE COURT: Who said so?

7 MR. DAVIS:ardon me?

8 THE COURT: Who said so?

9 MR. DAVIS: The United States Supreme Court says
10 so in a number of cases.

11 THE COURT: In what case?

12 MR. DAVIS: In particular in Chambers and Maroni.
13 The analysis is that once there is an arrest -- and there
14 the analysis was search incident to arrest -- once there is
15 an arrest, the major intrusion on the individual has occurred.
16 He has been stopped, he has been arrested, and any further
17 minor intrusions into the car or into the parts of the car --

18 THE COURT: For what purpose?

19 MR. DAVIS: For any purpose. To search for
20 evidence, although we are not contending that is necessarily
21 what was happening here. But for any purpose they are
22 subsumed within the initial arrest, because that is the major
23 intrusion in violation of the Fourth Amendment values that
24 has occurred.

25 Furthermore, your Honor, in the inventory cases,

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2 and I am talking particularly, I believe, about Preston v.
3 United States, which we cited in our memorandum today, the
4 Supreme Court says quite clearly that once a car is impounded,
5 the owner of the car or the possessor of the car no longer
6 has any rights.

7 THE COURT: But you are leaving out the fact
8 that he was just arrested for vagrancy or something like
9 that, which has an awfully important impact on the
10 determination in the Preston case.

11 MR. DAVIS: But in that case, your Honor, the car
12 was impounded, and that was the starting point of the
13 Supreme Court's analysis. Their analysis was: Once it is
14 impounded, the officers have a duty and a right to search
15 through the car whenever they please without going to a
16 magistrate, without making any further demonstration of
17 probable cause.

18 Furthermore, in Cady v. Dumbrowski the car was
19 impounded not incident to the arrest of the person driving
20 it at the time. There the Court said not only did they have
21 the right to search it but they should search it. They
22 should go through the car meticulously to make sure that
23 they know precisely what is in the car. And they do this
24 for the reasons that Investigator Johansen just testified
25 about.

2 But what often happens in these cases, I under-
3 stand from this opinion and from Mr. Johansen, is that
4 people come back later saying, "We had \$50,000 in bills that
5 I was taking to my grandmother's," or something like that.
6 "Where is it? We are going to sue you for it." So officers
7 in the position of Investigator Johansen have not only the
8 right but the obligation, the duty, to find out precisely
9 what is in there.

10 Mr. Lanna has been making much of the fact that
11 when the people actually went into the car did so, they were
12 not doing it saying to themselves as they went, "Now I am
13 making an inventory, now I am making an inventory." It is
14 the Government's position that is absolutely irrelevant,
15 for two reasons. One is that the car was impounded at that
16 time, and the police officer --

17 THE COURT: Your theory being that the car was
18 seized at that time. Impounded has a more technical sense,
19 I think.

20 MR. DAVIS: The car was seized, right.

21 THE COURT: The car was seized and it was in the
22 custody and control of the police officer.

23 MR. DAVIS: Right, your Honor.

24 THE COURT: Your theory is, once that happens, the
25 police officer had complete authority to go through that car

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2 from stem to stern.

3 MR. DAVIS: Right, your Honor.

4 THE COURT: Period.

5 MR. DAVIS: Pardon me?

6 THE COURT: Period.

7 MR. DAVIS: Period. We have other arguments, but
8 that is one argument, and I believe it is a sufficient one.

9 THE COURT: What is your second argument?

10 MR. DAVIS: Let me make one more point as to this
11 argument. There is a case called United States v. Borell
12 that was decided in this circuit two years ago, and I think
13 that is indicative of this case. What happened there was
14 that someone died and the police went through that person's
15 apartment and took everything they could find in the
16 apartment and seized it. Mr. Borell had some stuff in that
17 apartment. As soon as he heard about this search, he went
18 running to the police and said, "Look, I'm not arrested for
19 that murder." And the police said, "Right, we've got nothing
20 on you." And he said, "You've got some of my stuff. Return
21 it to me."

22 The police did not do so, but turned it over to
23 federal authorities. That conviction was reversed, because
24 that stuff was not suppressed.

25 It is very interesting to read that opinion, because

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2 they said, "This stuff should not have been suppressed,
3 except that this person had nothing to do with the crime,
4 he was not under arrest, he had no connection with the
5 seizing of the material, and he had claimed it prior to
6 search."

7 In this case no one had claimed any of the
8 contents except the defendant who is under arrest, and
9 further that gave the authorities a reason for going
10 with Mr. Battia to get the stuff out of the car, because
11 they knew that --

12 THE COURT: That is the same as Argument No. 1.

13 MR. DAVIS: All right. I knew that, your Honor.
14 Just to footnote that argument.

15 The second argument is that the Supreme Court and
16 the Second Circuit have said on a number of occasions that
17 when a search may be had incident to an arrest, it is
18 irrelevant if actual search takes place at a later date, at
19 a later time. In other words, when Mr. Zaicek was arrested,
20 the police authorities had power to make a search incident
21 to that arrest. They had power to look through the car, to
22 find any evidence that Mr. Zaicek could find and destroy
23 or they could look to find weapons, they could look to find
24 anything relevant to the arrest, and perhaps more.

25 As your Honor is well aware, there are a number

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2 of cases that say that when a car is stopped, because of
3 the mobility of the car and because of the fact that it can
4 be taken out of the jurisdiction, the Fourth Amendment
5 requirements are particularly lax --

6 THE COURT: But that does not apply here when
7 they have got the car in the police barracks.

8 MR. DAVIS: Right, your Honor. But it does apply
9 at the time of the arrest. There are a number of cases in
10 this circuit -- and I am talking about particularly United
11 States v. Riggs and others that I think are included in
12 the memorandum, but particularly Riggs -- that say that once
13 you have the power to search for a valid reason, the fact
14 that the actual search is put off to more convenient time
15 and place is irrelevant.

16 THE COURT: Are you entitled to search the entire
17 car or only that portion within his immediate reach in the
18 vicinity?

19 MR. DAVIS: I believe the cases are quite clear
20 that you have power to search the entire car, because at the
21 time of the arrest the car could be taken away, the whole
22 car could be driven to New Jersey, could be driven out of
23 the jurisdiction.

24 In particular I would like to mention again
25 Chambers and Maroni, which also talks, I believe, about this

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2 time problem. In other words, once the initial arrest and
3 stop have been made, that is the major intrusion, that is
4 what the Fourth Amendment talks about. Later, if minor
5 intrusions subsumed in the first stop occur, Chambers and
6 Maroni indicate quite strongly those are irrelevant.

7 I also would like to point out United States v.
8 Edwards, which was decided this --

9 THE COURT: You say if a man is arrested for
10 vagrancy you have a right to search his car?

11 MR. DAVIS: That is not this case, but I think
12 that is precisely what Gustafson v. Florida held last
13 November -- Florida v. Gustafson. Because there a person
14 was arrested, I believe, for crossing the line in the
15 middle, and the police searched stuff in the back of his
16 car. That case is usually cited for the proposition that
17 they searched him, but the reports show clearly that they
18 searched the car as well. And here we have a stolen car.
19 He had more than probable cause to know that this car, this
20 very car, was stolen and did not belong to Louis Zaicek, it
21 belonged to someone else.

22 As I say, this gives them power to do two things.
23 It gives them power to search the car incident to that
24 arrest, and it gives them the power and the duty to search
25 through the entire car to make sure they know exactly what is

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2 in it.

3 As I say, that effectually is what was done.
4 The intent of the police officers who actually did the
5 physical reaching into the car is irrelevant, because they
6 had the power to do so. Their reason for doing so was not
7 unreasonable. But the point is, they had the power to
8 inventory the entire car, to take it apart, to find out
9 exactly what was there.

10 THE COURT: All right. Now the second problem
11 of statements.

12 You want a hearing on that, Mr. Lanna?

13 MR. LANNA: Excuse me, sir?

14 THE COURT: Do you want a hearing on the
15 suppression of any statements made by this defendant?

16 MR. LANNA: No, sir.

17 THE COURT: You waive that.

18 MR. LANNA: I waive it.

19 Are we off the suppression for a moment now?

20 THE COURT: I gather we are.

21 MR. LANNA: All right. Relative to the trial
22 for December 16, I have already brought some extensive
23 motions and we had agreed on certain material, and that was
24 under the old information. Frankly, I take it I can work
25 things out with Mr. Davis as to any additional.

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THE COURT: Do it by the end of this week. If you have any problems, come back to me next week with them.

MR. DAVIS: Your Honor, at the pretrial conference certain things were directed to be turned over to the defendant on the day of the trial. I take it I am under no obligation to turn those things over.

THE COURT: No, but he is talking about the new count. I gather everything is cleared up as far as the original information is concerned. You have the new count. Work those things out with him before the end of the week.

MR. DAVIS: Quite frankly, I think I have gotten most of the information anyway this morning from the stand.

THE COURT: I would think so.

I will see you on December 16 in this courtroom.

Decision reserved.

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I N D E X

WITNESSES

Direct Cross Redirect

George L. Johansen

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Martin E. Upmal

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EXHIBITS

For the Government:

For Iden.

In Evid.

1 - New York State Police report

16

2 - Lease agreement

18

19

3 - Florida registration certificate

20

21

4 and 5 - Two driver's licenses, Louis
Zaicek

20

22

6 - Vermont purchase and tax form

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7 - Application for Vermont registration

48

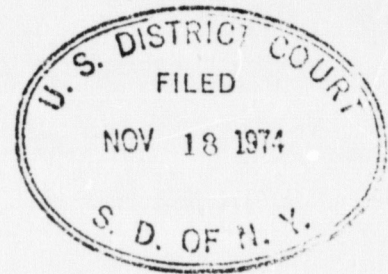
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For the Defendant:

A - Bill of sale

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COPY A 75 OPINION



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
UNITED STATES OF AMERICA,

-against-

LOUIS ZAICEK,

Defendant.

: #41449
: 74 Cr. 1036

----- x
NETENBER, D. J.:

Defendant moves to suppress as evidence stolen
bonds discovered in the course of the search of a car
that was seized in connection with his arrest for
having stolen the car.

Defendant was driving a Cadillac out of a
driveway next to Mr. Baddia's residence in Valhalla,
New York. Baddia was seated next to him in the car.
A state trooper, who had prior information that the
car was stolen, stopped the car and then went into the
house with defendant and Baddia. At defendant's
request a phone call was made to a rental car agency
in Florida. Thereafter, defendant was placed under
arrest for having stolen the Cadillac. The parties
then returned to the car and all were taken to the

state police barracks in Hawthorne. When Baddia found out that the pre-arraignment processing of defendant would take some time, he requested permission to get some of his clothing from the car. The arresting officer gave the car keys to a fellow officer who accompanied Baddia to the car. A short time later the officer returned with Baddia to the barracks with a gun which he found in the glove compartment, and an attache case found in the locked trunk containing a number of bonds that were subsequently ascertained to have been stolen. The arresting officer testified that subsequently he inventoried the contents of the car.

The briefs submitted by the government in advance of the hearing contended that the search was conducted as an incident to a lawful arrest. The report prepared by the arresting officer at the time made the same assertion. There is no doubt that the arrest was lawful, but as the evidence developed on the hearing showed, the search was not conducted as claimed. First, the arrest occurred in the house (cf. Coolidge v. New Hampshire, 403 U.S. 443 (1971)). Second, assuming the propriety of a vehicle search, it could not encompass a locked trunk

of the car. See, Chinai v. California, 395 U.S. 372 (1969).

After the completion of the hearing, the government argues that the search was valid, either because it had the right to inventory at the time of the search, even though the search itself was not an inventory, or because any search of a motor vehicle is valid following a valid seizure.

In Harris v. United States, 390 U.S. 234 (1968), a car was seized for use as evidence, and searched pursuant to a police regulation. That regulation provided that a search be made and all valuables be removed from the car. The Court reasoned that the police had a right to inventory for the protection of the car and its contents. This, the Court held, "was not . . . a search of the car, but . . . a measure taken to protect the car while it was in police custody. Nothing in the Fourth Amendment requires the police to obtain a warrant in these narrow circumstances." Id. at 236.

While there is no rule or regulation concerning such an inventory search in New York, the testimony does indicate that an inventory is taken as a matter of course.

such activity is not unreasonable under the circumstances insofar as the Fourth Amendment is concerned.

The government argues that since the right to inventory existed at the time of the search, the search itself was valid. This is ineffective for the search was not an inventory. It resulted from Edwards's request to get his clothes. The inventory was admittedly taken some time thereafter. The government's reliance on United States v. Edwards, 415 U.S. 800 (1974) is unavailing. The Edwards doctrine allows a search incident to a valid arrest to be conducted later than at the time of actual arrest. But this does not control the right to make a different kind of search. The purpose of inventory, which, under Harris, supra, is not really a search at all, is protection, not production of evidence. It is for this narrow purpose only that the warrantless intrusion is permitted. This cannot be extended to cover any kind of search, or a search for any purpose. The actual search was a warrantless "fishing expedition" which cannot be justified under the guise of an inventory that might have occurred and in fact did occur sometime thereafter.

The final contention of the government is that under the cases, police may now search a vehicle at will, from stem to stern, so long as the vehicle has properly seized. The cases hold otherwise. As the Court held in Carroll v. California, 366 U.S. 68 (1967) "lawful custody of an automobile does not of itself dispense with constitutional requirements of searches thereafter made of it". . . . " Id. at 81. In Cady v. Bombroski, 413 U.S. 433 (1973), there was probable cause to believe that the gun was in the car.

It should be noted in this regard that once the car is in police custody, there is no threat of removal of evidence therein. There is ample time to obtain a search warrant based upon probable cause. As the plurality of the Court has recently stated:

"The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears. . . . [I]t is not a case of a alerted criminal bent on flight, no fleeting opportunity on an open highway after a harrowing chase, no contraband or stolen goods or weapons, no contraband waiting to move the evidence, not even the inconvenience of a special police detail to guard the immobilized automobile. In short, by no possible stretch of the legal imagination can this be made into a case where 'it is not practicable to secure a warrant'. . . ." Chadwick v. New Hampshire, 403 U.S. 443, 461-62 (1971) (citation omitted).

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Defendant's motion to suppress is granted.

So ordered.

Dated: New York, N. Y.
November 13, 1974

CHARLES M. METZNER

U. S. D. J.

:ka

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x

UNITED STATES OF AMERICA :

v. :

MOTION

S 74 Cr. 1036

LOUIS ZAICEK, :

Defendant. :

----- x

For the reasons set forth in the accompanying affidavit of Frederick T. Davis, Assistant United States Attorney, the Government respectfully moves that the motion of the defendant for the suppression of evidence be reheard.

Dated: New York, New York

December 3, 1974

PAUL J. CURRAN
United States Attorney

By:

FREDERICK T. DAVIS
Assistant United States Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x

UNITED STATES OF AMERICA : AFFIDAVIT
v. : S 74 Cr. 1036
LOUIS ZAICEK, :
Defendant. :

----- x

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

FREDERICK T. DAVIS, being duly sworn, deposes
and says:

1) That he is an Assistant United States Attorney
in the office of Paul J. Curran, United States Attorney for
the Southern District of New York, and as such is familiar
with the facts of this case.

2) That on November 13, 1974, a hearing was held
on the defendant's motion to suppress, and on November 18,
1974, a memorandum opinion was filed granting this motion;

3) That since the time of the hearing evidence
has come to the attention of the Government that indicate
that this decision was based upon an incomplete presentation
of the facts underlying the search. In particular, one
William MacAbee, a state policeman at the time of the search
but now in private industry, would be able to testify that
he searched the car of Louis Zaicek on December 27, 1972,
that he came upon stolen bonds when Armerio Badia stated
that he had an attache case in Zaicek's car, and that he
opened the case believing that it might be Badia's;

4) That this evidence was not presented at the time of the hearing on the motion to suppress because MacAbee could not be found with the police force at that time;

5) That the subsequent delay in filing this motion has been caused by procedures relating to communication with the Office of the Solicitor General in Washington, D. C.; and

6) That this motion is made not with the intent of causing further delay, but rather of avoiding a need for an appeal by the Government of the legal issues underlying this case.

FREDERICK T. DAVIS
Assistant United States Attorney

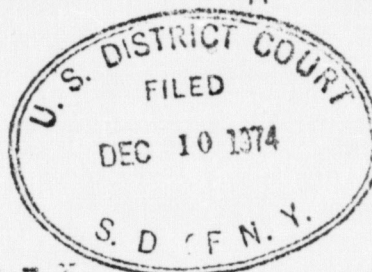
Sworn to before me this

3rd day of December, 1974

COPY

A 84

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



UNITED STATES OF AMERICA,

-against-

LOUIS BRICK,

Defendant.

: #41550
: 14 Cr. 1036

METANER, D. J.:

The government applies for a rehearing of the granting of the suppression motion in the above matter.

After an evidentiary hearing held on November 13, 1974, the court filed an opinion on November 18, 1974 granting the motion.

On December 3, 1974, after being advised that the government would appeal the granting of the motion to suppress, the court adjourned the trial and scheduled another trial to proceed on December 16. Later that afternoon, the court received the instant motion.

The government cannot seem to make up its mind as to what its theory is. In any event, the proffered new evidence could have been obtained with due diligence before the original suppression hearing.

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On September 19, 1974, counsel were informed that the hearing would go forward on November 13. On November 13, no mention was made to the court of attempts to subpoena State Policeman MacBee, or the nature of his testimony. In fact, the court asked the Assistant United States Attorney during the suppression hearing whether he was going to produce the state policeman who had conducted the search, and the reply was in the negative.

Consequently, this motion is denied and the trial will be stayed until January 6, 1975 to afford the government an opportunity to file a notice of appeal from the granting of the motion to suppress and the denial of this motion for a rehearing.

So ordered.

Dated: New York, N.Y.
December 9, 1974

CHARLES H. WITMER
U. S. D. J.

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Frederick Townsend Davis being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District
of New York.

That on the 17 day of January, 1975
he served 2 copies of the within brief* by placing the
same in a properly postpaid franked envelope addressed:

Vincent W. Lanna, Esq.
Lanna, Coppola + Rosato
50 Riverside Avenue
Yonkers, N. Y. 10701

* together with one copy of the accompanying
Appendix

And deponent further says that he sealed the said en-
velope and placed the same in the mail drop for mailing
at the United States Courthouse, Foley Square, Borough
of Manhattan, City of New York.

Frederick Townsend Davis

Sworn to before me this

JEANETTE ANN GRAYB
Notary Public, State of New York
No. 24 1541575
Qualified in Kings County
Certificate filed in New York County
Court on August 20, 1975

17 day of January, 1975